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HAROLD B. WILLEY

No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, EX REL. FORD JOHNSON,

Petitioner,

v.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, AS GOVERNING BOARD OF THE DEPARTMENT OF STATE LANDS AND INVESTMENTS; J. HUGO ARONSON, GOVERNOR OF THE STATE OF MONTANA, PRESIDENT OF SAID BOARD; MARY M. CONDON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MONTANA; SAM W. MITCHELL, SECRETARY OF STATE OF THE STATE OF MONTANA; ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, AS MEMBERS OF SAID BOARD; AND LOU W. BRETZKE, COMMISSIONER OF STATE LANDS AND INVESTMENTS,

Repondents.

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE

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In accordance with Rule 42 (4) the State of South Dakota, by its Attorney General, Phil W. Saunders, respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari in the above entitled case.

I.

In addition to the State of Montana, the States of Washington, North Dakota and South Dakota were admitted as states of the United States pursuant to the Enabling Act known as the Act of February 22, 1889 (25 Stat. 676), and have an equal interest with the State of Montana in the interpretation of said Enabling Act and the amendments thereto. Thus, the question presented on appeal of the above action of the interpretation and construction of the 1948 Amendment to Section 11 of said Enabling Act, known as Public Law 480 of the Eightieth Congress (62 Stat. 170), is of vital concern to the State of South Dakota. The pertinent part of the 1948 Amendment reads:

> "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years."

II.

The current South Dakota oil and gas leases involving school and public lands granted the State of South Dakota by said Enabling Act are made pursuant to the authority of the South Dakota Legislature as contained in S.D.C. Supp. 15.0510, which provides for a term not to exceed ten years and as long thereafter as oil or gas is produced from the leased lands. Said South Dakota leases contain the following duration clause:

"It is agreed that this lease *shall remain in force for a*

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term of ten years from this date, and as long thereafter as oil, gas, casinghead gasoline or any of them is produced from said leased premises, or drilling operations are continued as hereinafter provided."

The above italics clearly reflects the conflict which exists between the majority opinion of the Montana Supreme Court in the above entitled matter and the position of the State of South Dakota.

III.

The said decision of the Supreme Court of the State of Montana has a maximum effect, as precedent, of raising a question with respect to the validity of oil and gas leases presently in force upon South Dakota Enabling Act lands, and a minimum effect of detracting substantially from the revenues which the State of South Dakota may, in future leasing, expect to derive from the leasing of such lands in that the said decision introduces uncertainty which may reflect adversely upon the value of South Dakota lease offerings of such lands.

IV.

Unlike the situation in the State of Montana, where the issue went into litigation before a single lease of such duration was ever issued, the situation in the State of South Dakota is of even more serious consequence in that the State of South Dakota now has under outstanding leases containing such a duration clause approximately three million acres of Enabling Act lands, and from these leases the State of South Dakota has to date derived revenues of approximately five million dollars. Moreover, there is now some oil being produced under certain of these leases, and there are therefore substantial interests which have been vested by production under such leases.

V.

Though argument on the merits in this litigation will be properly in order when and if this Honorable Court grants certiorari, it is here pointed out that a lease having a duration measured by production is nevertheless, within the framework of the congressional purpose in enacting said 1948 amendment, a lease for a term of years, which term of years is indefinite. This is true because, to put the matter briefly, oil and gas are wasting resources which, to keep a producing lease in force, must be regularly produced by the lessee after discovery to the full economic extent feasible in order that the covenants and obligations of his lease be met and the lease thereby kept in force. When commercial production is exhausted, the lease is at end. In the case of usual producing properties, this term of years is relatively short, and in all cases a future time of lease termination is always a certain prospect. Reference to the congressional committee reports preceding the amendment here in issue make it abundantly clear that the Congress intended just such an indefinite term of years. The Enabling Act should be interpreted in conformity with this congressional intent, for the wording of the amendment is susceptible of such an interpretation, which interpretation would be in conformity with the plain congressional purpose.

CONCLUSION

The State of South Dakota believes that the decision of the Supreme Court of Montana sought to be reviewed here is erroneous. For the reasons set forth in the Petition

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for Writ of Certiorari as well as in this Brief, the State of South Dakota accordingly urges that the petition be granted, and that the judgment of the Supreme Court of Montana be reversed.

Respectfully submitted,

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State Capitol
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